SUPREME COURT OF THE UNITED STATES.

No. 15, Original.—October Term, 1931.

The State of Wyoming, Complainant,
vs.
The State of Colorado, Defendant.
} In Equity.

[May 31, 1932.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This is a suit brought by the State of Wyoming against the State of Colorado to enforce a decree of this Court (259 U. S. 419, 496; 260 U. S. 1,) rendered in an earlier suit between the same States respecting their relative rights to divert and use for irrigation the waters of the Laramie River, a stream rising in Colorado and flowing northward into Wyoming.

In the present bill, shortly described, Wyoming alleges that Colorado is departing from that decree by permitting the diversion and use within her territory of waters of the Laramie in quantities largely in excess of those accorded to her by the decree; that these excessive diversions are preventing Wyoming from receiving and using the amount of water which the decree accorded to her; that Colorado, unless restrained by this Court, will continue to permit such excessive diversions and thereby will largely or entirely deprive Wyoming of the use of the water accorded to her in the decree; that the measuring devices installed by Colorado to measure the waters diverted within her territory do not accurately show the full quantities so diverted; and that Colorado refuses, although duly requested, to permit Wyoming to install other suitable devices or participate in the measurements.

The bill construes the decree as determining the rights of the two States in the waters of the Laramie by according to Colorado

1. 18,000 acre feet of water per annum by reason of the Skyline ditch appropriation;

2. 4,250 acre feet of water per annum by reason of certain meadowland appropriations;

3. A relatively small amount of water appropriated prior to 1902 through the Wilson Supply ditch from the headwaters of Deadman Creek, a Colorado tributary of the Laramie; and

4. 15,500 acre feet of water per annum by reason of the Laramie-Poudre tunnel appropriation, making an aggregate of 37,750 acre feet per annum, apart from the Wilson Supply ditch appropriation;

and by according to Wyoming 272,500 acre feet of water per annum by reason of appropriations in that State.

The relief sought is the protection and quieting of Wyoming's rights under the decree; provision for accurately and effectively measuring and recording the quantities of water diverted in Colorado; an injunction restraining Colorado from continuing or making any diversion in excess of the quantities of water accorded to her by the decree—in the event the injunction in that decree is held to relate only to diversion by reason of the Laramie-Poudre tunnel appropriation; and such other and full relief as may be just and equitable.

Colorado challenges the bill by a motion to dismiss in the nature of a demurrer. The principal grounds of the motion are, (1) that the bill proceeds upon the theory that the prior decree determined, as against Colorado and her water users, the full quantity of water which rightfully may be diverted from the stream within that State, and likewise the quantity which Wyoming and her water users are entitled to receive and use from the stream within that State—all of which, it is insisted in the motion, is refuted by the record, opinion and decree in the prior suit; (2) that the bill shows that the acts complained of are not acts done by Colorado, or under her authority, but acts done by private corporations and individuals not parties to the present suit and with respect to which no relief can be had against Colorado; and (3) that, in any event, the bill fails to show with certainty any violation of the decree or any damage to Wyoming or her water users.

In the bill, Wyoming does take the position that the decree in the earlier suit determines the rights of each State as against the other, including their respective water users, respecting the diversion and use of the waters of the interstate stream—in other words, that the decree fixes and limits the quantities of water which Colorado, including her water users, is entitled to divert and use within that State and thus withhold from Wyoming, and likewise determines the amount of water which Wyoming, including her water users, is entitled to receive and use within her territory. Counsel for Colorado, recognizing that such is the position taken in the bill, say in their brief: "The principal purpose of the motion

to dismiss is to join issue with the contention of the complainant that the whole matter has already been adjudicated by the former decree. The problem so presented is a law question and it is apprehended that this should be determined *in limine*". And, after indicating Colorado's purpose to answer if so required, they further say: "We insist, however, that the cause will be greatly accelerated and confusion be avoided by determining at the threshold the issues of law tendered by the complainant, and thereupon the issues of fact should be defined, if any are considered to stand for adjudication after passing upon the construction problem, which is the only substantial controversy in the case." Evidently therefore the construction of the decree in the earlier suit is the chief matter in dispute.

That suit was brought by Wyoming against Colorado and two Colorado corporations. The corporations, with Colorado's authority and permission, were proceeding to divert water from the Laramie in Colorado and to conduct it through a proposed tunnel into the valley of the Cache la Poudre in Colorado, there to be used in irrigation. The project was designed to divert from the Laramie 56,000 acre feet per annum at first and 15,000 more later on. The purpose of the suit was to prevent the proposed diversion, and to that end the complaint set forth, among other things, that the doctrine of appropriation for beneficial use, whereby priority in time gives priority in right, was recognized and applied by both Colorado and Wyoming in adjusting conflicting claims to the use of waters of natural streams; that Wyoming and her citizens had been for many years irrigating and thereby making highly productive very large amounts of land along the Laramie and its tributaries in that State through the use of waters appropriated for that purpose from those streams, and expenditures running into millions of dollars had been made in the construction of reservoirs, canals and other appliances for the purpose of so using such waters; that these appropriations and this use had been maintained from a time long prior to the commencement of the Laramie-Poudre tunnel project in Colorado; that the date when that project was commenced was "on or about the first day of December, 1909"; that before that project was commenced Colorado and certain of her citizens had appropriated water from the Laramie in Colorado for the irrigation of lands (meadow lands) in that State adjacent to that stream,

but that the total amount of water reasonably and beneficially used upon such lands did not exceed 6,000 acre feet per annum; that "no other appropriations or use of said waters of said Laramie River or its tributaries had been made by the State of Colorado or its citizens, or within the said State of Colorado, prior to the appropriations of said waters by your orator and its citizens as herein set forth"; that prior to the commencement of the Laramie-Poudre tunnel project in Colorado Wyoming and her citizens had appropriated all of the available waters of the Laramie and its tributaries for the actual irrigation of lands in Wyoming aggregating hundreds of thousands of acres and supporting thousands of people; that without the use of the waters so appropriated these lands would be to a large extent valueless and incapable of supporting any considerable population; and that the consummation of the proposed Laramie-Poudre tunnel diversion would deprive Wyoming and her citizens of a very large amount of water to the use of which they were rightly entitled in virtue of their appropriations, and would take from many of their lands much of their value.

The prayer was for an injunction preventing the defendants and each of them from making the proposed diversion, and for general relief.

Colorado, in answering the complaint, admitted that before the commencement of the Laramie-Poudre tunnel project certain of her citizens had appropriated water from the Laramie and its tributaries in that State for the irrigation of adjacent lands (meadow land), but averred that these appropriations amounted to about 8,000 acre feet per annum; alleged that "other appropriations of said waters of said Laramie River and its tributaries had been made by the State of Colorado and its citizens within the State of Colorado prior to the appropriations of said waters by complainant and its citizens"; averred that the right to the proposed Laramie-Poudre tunnel diversion was initiated, by commencement of construction, August 25, 1902, and that at the time of such initiation there was abundant water in the Laramie to satisfy all prior appropriations then in existence in Colorado and Wyoming; denied that Wyoming and her citizens had appropriated all of the available waters of the Laramie and its tributaries prior to that threatened diversion, and averred that there was ample water in those streams to supply the threatened diversion and all

prior rights in Wyoming; alleged that when the right to make that diversion was initiated, the appropriations effected or initiated in Wyoming did not exceed 50,000 acre feet; averred that the maximum diversion which could be made through the Laramie-Poudre tunnel project did not exceed 70,000 acre feet annually, and the topographical and physical conditions were such that "by the system sought to be enjoined herein, and all other available means, no more than 90,000 acre feet annually can be diverted from said stream and its tributaries for use upon lands lying within the State of Colorado"; and denied that the consummation of the threatened diversion would work any injury to Wyoming or her citizens or the lands in that State.

Thus the pleadings directly put in issue the priority and measure of the appropriations in each State as against those in the other State, and also the extent of the available supply of water whereon all of the appropriations depended.

Evidence was produced by both States directly bearing upon these issues. Colorado's evidence was addressed to showing all appropriations in that State, not merely the Laramie-Poudre tunnel appropriation; and that evidence dealt in detail with the dates and measure of the meadow-land appropriations referred to in the complaint and answer; with the existence, date and measure of the Skyline ditch appropriation and the Wilson Supply ditch appropriation; and even with an appropriation from Sand Creek, a small interstate stream nominally but not actually a tributary of the Laramie. Colorado's state engineer gave 4,250 acre feet per annum as the measure of the meadow-land appropriations, 18,000 acre feet per annum as the measure of the Skyline ditch appropriation, and 2,000 acre feet per annum as the measure of the Wilson Supply ditch appropriation. Some of her witnesses gave different measures. All who spoke of the Wilson Supply ditch agreed that it was used to divert water from the headwaters of Deadman Creek, a Colorado tributary of the Laramie, into Sand Creek, from which that water, or its equivalent, was rediverted at a lower point, along with other water from Sand Creek, through the Divide ditch and ultimately carried into the Cache la Poudre valley. Colorado's evidence indicated that the meadow-land, Skyline and Wilson Supply appropriations were earlier than the Laramie-Poudre tunnel appropriation and many of the Wyoming appropriations;

and Wyoming recognized this difference in the dates of appropriation, although raising some question as to the quantity of water in the earlier appropriations so recognized.

In their briefs in that suit counsel for Colorado, while urging that the doctrine of appropriation was not applicable to a controversy between the two States, but only to controversies between private appropriators within the same State, recognized that the Court might hold otherwise; and on that basis they presented what they termed "a complete review of the evidence showing the respective priorities of diversion from the Laramie River in Colorado and Wyoming". In that review they listed the aforementioned meadow-land, Skyline, Wilson Supply and Sand Creek appropriations and the proposed Laramie-Poudre tunnel appropriation, as constituting the "diversions and use by Colorado and her citizens", and urged that Colorado be recognized as entitled to all of them under the rule of priority, if that rule was given effect.

With the issues, evidence and propositions of law here outlined submitted to it, the Court proceeded to a decision.

The influence to be given to the doctrine of appropriation was much considered, as the opinion shows, and in disposing of that question the Court said (259 U. S. 467, 468, 470):

"The lands in both States are naturally arid and the need for irrigation is the same in one as in the other. The lands were settled under the same public land laws and their settlement was induced largely by the prevailing right to divert and use water for irrigation, without which the lands were of little value. Many of the lands were acquired under the Desert Land Act which made reclamation by irrigation a condition to the acquisition."

. . . . .

"In neither State was the right to appropriate water from this interstate stream denied. On the contrary, it was permitted and recognized in both. The rule was the same on both sides of the line. Some of the appropriations were made as much as fifty years ago and many as much as twenty-five. In the circumstances we have stated, why should not appropriations from this stream be respected, as between the two States, according to their several priorities, as would be done if the stream lay wholly within either State? By what principle of right or equity may either State proceed in disregard of prior appropriations in the other?

"Colorado answers that this is not a suit between private appropriators. This is true, but it does not follow that their situation and what has been accomplished by them for their respective States can be ignored. As respects Wyoming the welfare, pros-

perity and happiness of the people of the larger part of the Laramie valley, as also a large portion of the taxable resources of two counties, are dependent on the appropriations in that State. Thus the interests of the State are indissolubly linked with the rights of the appropriators. To the extent of the appropriation and use of the water in Colorado a like situation exists there."

. . . . . .

"We conclude that Colorado's objections to the doctrine of appropriation as a basis of decision are not well taken, and that it furnishes the only basis which is consonant with the principles of right and equity applicable to such a controversy as this is. The cardinal rule of the doctrine is that priority of appropriation gives superiority of right. Each of these States applies and enforces this rule in her own territory, and it is the one to which intending appropriators naturally would turn for guidance. The principle on which it proceeds is not less applicable to interstate streams and controversies than to others.[1] Both States pronounce the rule just and reasonable as applied to the natural conditions in that region; and to prevent any departure from it the people of both incorporated it into their constitutions. It originated in the customs and usages of the people before either State came into existence, and the courts of both hold that their constitutional provisions are to be taken as recognizing the prior usage rather than as creating a new rule. These considerations persuade us that its application to such a controversy as is here presented cannot be other than eminently just and equitable to all concerned."

Respecting the available supply of water the Court found from the evidence that Sand Creek is nominally but not actually a tributary of the Laramie, and therefore not to be considered; that at Woods, a gauging station near the Colorado-Wyoming stateline, the natural flow of the Laramie after the "recognized Colorado appropriations" are satisfied is such as to afford an available supply of 170,000 acre feet per year, but not more; that the stream receives below Woods contributions of 93,000 acre feet from the Little Laramie and 25,000 acre feet from smaller affluents, making the entire available supply 288,000 acre feet, apart from the quantities required to satisfy the "recognized Colorado appropriations"; and that

"The available supply—the 288,000 acre feet—is not sufficient to satisfy the Wyoming appropriations dependent thereon and

[1]Followed and applied in Weiland, State Engineer of Colorado *v.* Pioneer Irrigation Co., 259 U. S. 498, 502.

also the proposed Colorado appropriation,[2] so it becomes necessary to consider their relative priorities.

"There are some existing Colorado appropriations having priorities entitling them to precedence over many of the Wyoming appropriations. These recognized Colorado appropriations are,[3] 18,000 acre-feet for what is known as the Skyline Ditch and 4,250 acre-feet for the irrigation of that number of acres of native-hay meadows in the Laramie valley in Colorado, the 4,250 acre-feet being what Colorado's chief witness testifies is reasonably required for the purpose, although a larger amount is claimed in the State's answer. These recognized Colorado appropriations, aggregating 22,500 acre-feet, are not to be deducted from the 288,000 acre-feet, that being the available supply after they are satisfied. Nor is Colorado's appropriation from Sand Creek to be deducted, that creek, as we have shown, not being a tributary of the Laramie."

From the evidence bearing upon the relative priorities of the proposed Colorado appropriation and the Wyoming appropriations the Court found that work on the former was begun in the latter part of October, 1909, and was prosecuted with such diligence that the appropriation should be accorded a priority as of the date when the work was begun; that some of the Wyoming appropriations were senior and others junior to that appropriation; that those which were senior to it and dependent on the common source of supply amounted to 272,500 acre feet per annum; and that

"As the available supply is 288,000 acre feet and the amount covered by senior appropriations in Wyoming is 272,500 acre feet, there remain 15,500 acre feet which are subject to this junior appropriation in Colorado."

After stating these findings, the Court's opinion concluded:

"A decree will accordingly be entered enjoining the defendants from diverting or taking more than 15,500 acre feet per year from the Laramie River by means of or through the so-called Laramie-Poudre project."

Thereupon a decree was entered declaring (259 U. S. 496):

"It is considered, ordered and decreed that the defendants, their officers, agents and servants, be, and they are hereby, sever-

[2]The reference is to the threatened Laramie-Poudre tunnel diversion.

[3]The Wilson Supply ditch appropriation should have been included here among the recognized Colorado appropriations and was included among them in a modified decree, as will appear later on.

ally enjoined from diverting or taking from the Laramie River and its tributaries in the State of Colorado more than fifteen thousand five hundred (15,500) acre-feet of water per annum in virtue of or through what is designated in the pleadings and evidence as the Laramie-Poudre Tunnel appropriation in that State,

"Provided, that this decree shall not prejudice the right of the State of Colorado, or of any one recognized by her as duly entitled thereto, to continue to exercise the right now existing and hereby recognized to divert and take from such stream and its tributaries in that State eighteen thousand (18,000) acre-feet of water per annum in virtue of and through what is designated in the pleadings and evidence as the Skyline Ditch appropriation in that State; nor prejudice the right of that State, or of any one recognized by her as duly entitled thereto, to continue to exercise the right now existing and hereby recognized to divert and take from such stream and its tributaries in that State four thousand two hundred and fifty (4,250) acre-feet of water per annum in virtue of and through the meadow-land appropriations in that State which are named in the pleadings and evidence; nor prejudice or affect the right of the State of Colorado or the State of Wyoming, or of any one recognized by either State as duly entitled thereto, to continue to exercise the right to divert and use water from Sand Creek, sometimes spoken of as a tributary of the Laramie River, in virtue of any existing and lawful appropriation of the waters of such creek."

Colorado and her co-defendants presented a petition for rehearing on stated grounds, one of which was that the Wilson Supply ditch appropriation was inadvertently omitted, in both opinion and decree, from the recognized early Colorado appropriations. As the omission was in fact inadvertent, the decree was then so modified as to include that appropriation among the others which Colorado was recognized as having a right to continue. 260 U. S. 1. A change in the provision respecting costs also was sought in the petition, and was included in the modified decree. In other respects the original decree was adhered to and a rehearing denied. In that petition Colorado and her codefendants construed the decree as allotting the available supply between the two States according to priority in appropriation and limiting Colorado's allotment "to 37,750 acre feet annually—Skyline 18,000, plus Colorado meadows 4,250, plus Laramie-Poudre 15,500".

We are of opinion that the record, opinion and decree in the prior suit, here reviewed at length, show very plainly that the decree must be taken as determining the relative rights of the two States, including their respective citizens, to divert and use the

waters of the Laramie and its tributaries. These rights were put in issue by the pleadings, displayed in the evidence, and considered and resolved in the opinion. Not only so, but the question of priority in time and right as between the appropriations in Colorado and those in Wyoming was directly presented by the pleadings and evidence and distinctly dealt with and resolved in the opinion.

As appears from the opinion, the Court held that the doctrine, long recognized and enforced in both States, whereby priority of appropriation gives superiority of right, furnished the only equitable and right basis on which to determine the controversy between them shown in the pleadings and evidence.

And as further appears from the opinion, the Court made specific findings showing the amount of water in the available supply, its insufficiency to satisfy all asserted appropriations, the date when the proposed tunnel appropriation in Colorado was initiated, the names and amounts of the appropriations in Colorado which were senior to that appropriation, the amount of water included in the Wyoming appropriations which were senior to it, and the amount which would remain in the supply and be subject to that appropriation after deducting what was required to satisfy the senior appropriations in both States.

These findings were pertinent to the issues, and upon them the Court pronounced its decree. Under a familiar rule the facts thus determined are not open to dispute in a subsequent suit between the same States.[4]

As before shown, the modified decree (1) restricts diversion under the Colorado tunnel appropriation to 15,500 acre feet, the amount which under the findings would remain in the supply after deducting the quantities included in the senior appropriations in both States; (2) recognizes and protects the Skyline appropriation of 18,000 acre feet, it being a senior Colorado appropriation; (3) similarly sustains the meadow-land appropriations of 4,250 acre feet, they being senior Colorado appropriations; (4) recognizes and protects the small Wilson Supply ditch appropriation made prior to 1902, it being a senior Colorado appropriation inadvertently omitted from the list in the opinion but given its proper place by a modification of the original decree; and (5)

[4]Southern Pacific R. R. Co. *v.* United States, 268 U. S. 1, 48; Southern Pacific R. R. Co. *v.* United States, 183 U. S. 519, 532.

saves from prejudice all appropriations of the waters of Sand Creek, found not to be a tributary of the Laramie.

The decree enjoins any diversion through the tunnel appropriation in excess of the 15,500 acre feet accorded to it—and this doubtless for the reason that there had been a declared and real purpose to divert from 56,000 to 71,000 acre feet under that appropriation. No showing appears to have been made indicative of any occasion at that time for a broader injunction. Of course, in the absence of such a showing, a broader injunction was not justified. Certainly the limited injunction which was granted does not warrant any inference that it marks the limits of what was intended to be decided. Such an inference would be inconsistent with other parts of the decree and with the opinion and the findings therein.

Construing the decree in the light of the record and opinion, to which counsel for both States appeal, we think it was intended to and does define and limit the quantity of water which Colorado and her appropriators may divert from the interstate stream and its tributaries and thus withhold from Wyoming and her appropriators.

But it is said that water claims other than the tunnel appropriation could not be, and were not, affected by the decree, because the claimants were not parties to the suit or represented therein. In this the nature of the suit is misconceived. It was one between States, each acting as a quasi-sovereign and representative of the interests and rights of her people in a controversy with the other. Counsel for Colorado insisted in their brief in that suit that the controversy was "not between private parties" but "between the two sovereignties of Wyoming and Colorado"; and this Court in its opinion assented to that view, but observed that the controversy was one of immediate and deep concern to both States and that the interests of each were indissolubly linked with those of her appropriators. 259 U. S. 468. Decisions in other cases also warrant the conclusion that the water claimants in Colorado, and those in Wyoming, were represented by their respective States and are bound by the decree.[5]

[5]Missouri *v.* Illinois, 180 U. S. 208, 241; Kansas *v.* Colorado, 185 U. S. 125, 142; s. c., 206 U. S. 46, 49; Georgia *v.* Tennessee Copper Company, 206 U. S. 230, 237; Hudson Water Company *v.* McCarter, 209 U. S. 349, 355; Pennsylvania *v.* West Virginia, 262 U. S. 550, 591, 595; North Dakota *v.* Minnesota, 263 U. S. 365, 373; Rhode Island *v.* Massachusetts, 12 Pet. 657, 748; Florida *v.* Georgia, 17 How. 478, 494, 510, 522.

The contention that the present bill shows that the acts complained of are not acts done by Colorado, or under her authority, but acts done by private corporations and individuals not parties to the present suit, is shown by the bill to be untenable. It is there alleged that Colorado in 1926 permitted a diversion from the Laramie through the Laramie-Poudre tunnel appropriation materially in excess of the 15,500 acre feet specified in the decree; that in 1926, 1927 and 1928, with the knowledge, permission and cooperation of Colorado, diversions were made from the Laramie and its tributaries through the Skyline ditch appropriation in stated amounts materially in excess of the 18,000 acre feet specified in the decree; that in 1926, 1927, 1928 and 1929, with the knowledge, consent and cooperation of Colorado, diversions were made from the Laramie and its tributaries through the meadowland appropriations in various amounts pronouncedly in excess of the 4,250 acre feet specified in the decree; and that Colorado has permitted other diversions from the Laramie and its tributaries in violation of the decree through the Bob Creek and other designated ditches, none of which were recognized or named in the findings or decree.

The contention that the bill fails to show with certainty any violation of the decree or any damage to Wyoming or her water users is largely refuted by the allegations just noticed, and is further refuted by an allegation that annually since the entry of the decree the amount of water in the Laramie available to Wyoming for its water users has been less than the 272,500 acre feet specified in the Court's findings, and this shortage has been caused by the excessive and otherwise unlawful diversions before described. It is true that some of the allegations purporting to state violations of the decree are uncertain and indefinite, but there are many which are not subject to this criticism, and plainly there is enough in the bill to require that the defendant be called upon to answer it.

An order will be entered overruling the motion to dismiss, permitting Wyoming to amend her bill within thirty days by making some of its allegations more definite and certain, if she be so advised, and permitting Colorado to answer the bill or amended bill, as the case may be, on or before the first day of September. next.

Motion to Dismiss Overruled.

SUPREME COURT OF THE UNITED STATES.

No. 10, Original.—October Term, 1935.

The State of Wyoming, Complainant,
vs.
The State of Colorado.
} In Equity.

[June 1, 1936.]

Mr. Justice Van Devanter delivered the opinion of the Court.

By this suit the State of Wyoming complains of the State of Colorado and asserts that the latter and her water claimants have been and are departing from a decree rendered by this Court in an earlier suit between these States (259 U. S. 419, 496; 260 U. S. 1,) and that the asserted departures have been and are working material injury to Wyoming and her water claimants. The principal relief sought is an injunction enforcing adherence to that decree.

The earlier suit and decree dealt with the relative rights of the two States and their respective water claimants to divert and use for irrigation the waters of the Laramie River, an innavigable stream which has its source in the mountains of northern Colorado, flows northerly 27 miles in that State, crosses into Wyoming, and there flows northeasterly 150 miles to the North Platte River, of which it is an affluent. That suit was largely provoked by a proposed and threatened diversion in Colorado (called the Laramie-Poudre Tunnel Project) of 50,000 acre feet or more from the Laramie River, which Wyoming alleged would not leave in the river sufficient water to satisfy older appropriations in that State.

Shortly after the present suit was begun the complainant's right to relief was challenged by a motion to dismiss, one ground of which was that the suit proceeds on the erroneous assumption that the earlier decree determined, as against Colorado and her water claimants, the full quantity of water which rightly may be diverted within that State from the stream, and likewise the quantity which Wyoming and her water claimants are entitled to receive and use within her borders. The motion was overruled (286

U. S. 494), the scope of the ruling and the reasons for it being shown in the following excerpts from the opinion then delivered.

"We are of opinion that the record, opinion and decree in the prior suit, here reviewed at length, show very plainly that the decree must be taken as determining the relative rights of the two States, including their respective citizens, to divert and use the waters of the Laramie and its tributaries. These rights were put in issue by the pleadings, displayed in the evidence, and considered and resolved in the opinion. Not only so, but the question of priority in time and right as between the appropriations in Colorado and those in Wyoming was directly presented by the pleadings and evidence and distinctly dealt with and resolved in the opinion.

"As appears from the opinion, the Court held that the doctrine, long recognized and enforced in both States, whereby priority of appropriation gives superiority of right, furnished the only equitable and right basis on which to determine the controversy between them shown in the pleadings and evidence.

"And as further appears from the opinion, the Court made specific findings showing the amount of water in the available supply, its insufficiency to satisfy all asserted appropriations, the date when the proposed tunnel appropriation in Colorado was initiated, the names and amounts of the appropriations in Colorado which were senior to that appropriation, the amount of water included in the Wyoming appropriations which were senior to it, and the amount which would remain in the supply and be subject to that appropriation after deducting what was required to satisfy the senior appropriations in both States.

"These findings were pertinent to the issues, and upon them the Court pronounced its decree. Under a familiar rule the facts thus determined are not open to dispute in a subsequent suit between the same States."

And again:

"Construing the decree in the light of the record and opinion, to which counsel for both States appeal, we think it was intended to and does define and limit the quantity of water which Colorado and her appropriators may divert from the interstate stream and its tributaries and thus withhold from Wyoming and her appropriators.

"But it is said that water claims other than the tunnel appropriation could not be, and were not, affected by the decree, because the claimants were not parties to the suit or represented therein. In this the nature of the suit is misconceived. It was one between States, each acting as a quasi-sovereign and representative of the interests and rights of her people in a controversy with the other.

. . . the water claimants in Colorado, and those in Wyoming, were represented by their respective States and are bound by the decree."

The earlier decree, so construed, confirms and establishes "the right of the State of Colorado, or of any one recognized by her as duly entitled thereto", to divert and take within that State

(1) 18,000 acre feet of water per annum from the Laramie River and its tributaries in virtue of the Skyline Ditch appropriation;

(2) 4,250 acre feet of water per annum from such stream and its tributaries in virtue of certain meadowland appropriations;

(3) The relatively small amount of water appropriated prior to 1902 from the headwaters of Deadman Creek, a tributary of the Laramie River, through the Wilson Supply Ditch;

(4) 15,500 acre feet of water per annum from the Laramie River and its tributaries, in virtue of the Laramie-Poudre Tunnel appropriation;

and that decree also confirms and establishes the right of the State of Wyoming and her water claimants to receive and divert within that State the remaining waters of the stream and its tributaries in virtue of appropriations prior in time and right to the tunnel appropriation in Colorado. A further provision in the decree enjoins the defendant State from diverting or taking from the river and its tributaries in virtue of the tunnel appropriation any water in excess of the confirmed right to 15,500 acre feet per annum, the reason for limiting the injunction to that appropriation being that there was no showing of an exigency requiring that it be broader.

In this view of the earlier suit and decree, we further held, in overruling the motion to dismiss the present suit, that the bill contains allegations of such material departures by Colorado and her water claimants from the earlier decree that she should be called upon to answer. Colorado did answer; evidence was then taken and reported by commissioners; and the cause has since been submitted on briefs and oral argument.

The departures from the decree which are charged against Colorado in the bill are of two classes—one comprising diversions under claims not confirmed or recognized in the decree, and the other consisting of diversions under each of the confirmed Colorado claims of more water than the decree accredits to the claim. In the answer

Colorado denies that certain of the diversions have been excessive or otherwise contrary to the decree, and admits that other designated diversions have not been in accord with the decree as construed in our opinion overruling the motion to dismiss, but asserts that they have been made in good faith and in accord with what the State's officers have understood the decree to be.

One complaint is of diversions through what are described in the bill and answer as Bob Creek ditch, Bob Creek extension ditch, Columbine ditch, and Lost Lake Reservoir system. These diversions are admitted in the answer. They are made, not under claims recognized or confirmed in the decree, but quite independently of it. Under the decree, as is pointed out in our opinion overruling the motion to dismiss, the Colorado claims which the decree recognizes and confirms are the only ones in virtue of which diversions may be made as against Wyoming and her appropriators. Claims not so recognized and confirmed are excluded. It follows that the diversions just described contravene the decree and infringe Wyoming's rights under it. They were being practiced when the present suit was begun and for a time thereafter, but when the motion to dismiss was overruled they were discontinued pending further action by us. Counsel for Colorado now assure us in their brief that the State does not propose to permit a resumption of these diversions if we hold, as we now do, that they contravene the decree. Because of this assurance, which we accept, there is no present need for granting an injunction in respect of these diversions.

Another complaint is of the diversion of water through the Wilson Supply ditch from the headwaters of Deadman Creek, a tributary of the Laramie. The substance of the complaint is (a) that there has been no appropriation under which this diversion may be made, and (b) that, even if there has been such an appropriation, the Wilson Supply ditch recently has been enlarged and is now made the means of diverting more water from the headwaters of Deadman Creek than was included in the appropriation. Neither phase of the complaint is tenable. The decree in the earlier suit (260 U. S. 1,) distinctly recognizes and confirms the existence of an appropriation enabling "the State of Colorado, or anyone recognized by her as duly entitled thereto," to divert and take from the headwaters of Deadman Creek "the relatively small

amount of water appropriated therefrom prior to the year 1902 by and through what is designated in the evidence as the Wilson Supply ditch". Wyoming is bound by this finding and adjudication. While the appropriation is there described as including a "relatively small amount of water" the record in that suit, to which the decree refers, shows that the appropriation is of 2,000 acre feet of water per annum—a relatively small amount when contrasted with the other appropriations of 18,000 and 4,250 acre feet which the decree recognizes in its next preceding parts. The decree is to be taken as if the exact amount of this appropriation were written into it.

While the evidence bearing on the alleged enlargement of the Wilson Supply ditch is conflicting, we are persuaded by it that what was done was more in the nature of repair than of enlargement. But this is not very material; for the evidence convinces us that the water diverted from the headwaters of Deadman Creek through the ditch has not been in excess of 2,000 acre feet per annum, the amount of the recognized appropriation.

It is well to state with some emphasis that what we have just said relates to the appropriation through the Wilson Supply ditch from the headwaters of Deadman Creek. The need for this statement arises out of the fact that other water which forms no part of this appropriation but is part of the natural flow of Sand Creek, is carried by the same ditch from Sand Creek to Sheep Creek. Sand Creek lies between Deadman Creek and Sheep Creek and for a part of its length is used as a section of the Wilson Supply ditch. We are not here concerned with the diversion or appropriation of the water naturally flowing in Sand Creek.

It is further complained that the diversions made under the meadowland appropriations which are recognized and confirmed in the decree are excessive, in that, while the decree fixes the amount of these appropriations at 4,250 acre feet per annum, the actual diversions thereunder have ranged from 36,000 to 62,000 acre feet per year. In the answer Colorado does not deny that waters greatly in excess of the amount fixed in the decree are taken from the stream into ditches leading to the meadowlands where it is to be applied, but asserts that after the water is applied the greater part of it returns to the stream through surface drainage and percolation and that the part actually consumed does not exceed the amount fixed in the decree.

It is apparent from the opinion in the earlier suit that 4,250 acre feet was fixed as the measure of these appropriations because the water is appropriated for the irrigation of 4,250 acres of native-hay meadows and one acre foot per acre is deemed sufficient for that purpose when the water is rightly and not wastefully applied.

The evidence shows that the water is being applied to the native-hay meadows by a process of continuous flooding whereby 10 or more acre feet are put on each acre during the irrigating season of 50 or 60 days. That this is a distinctly wasteful process is obvious. It is true that when water is so applied a considerable portion ultimately finds its way back into the stream unless the place of application be remote from the stream or in another water-shed, which is not the case in this instance. But it is also true that a material percentage of the water is lost by evaporation and other natural processes and that there is no way of determining with even approximate certainty how much of the water returns to the stream.

Colorado insists that the decree, in fixing the measure of these meadowland appropriations, refers to the amount of water consumptively used and not to the amount taken from the stream into the ditches leading to the place of use. The thing dealt with by the decree is described therein as the right "to divert and take" from the stream and its tributaries a designated amount of water. We think these words refer to the water taken from the stream at the point of diversion, and not to the variable and uncertain part of it that is consumptively used.

As it is plainly shown that diversions are being made under these meadowland appropriations in quantities largely in excess of the amount fixed in the decree, we think an injunction should issue forbidding further departures from the decree in this regard.

Another complaint is that the diversions under the Skyline ditch appropriation and those under the Laramie-Poudre tunnel appropriation have been and are in excess of the quantities accredited to them by the decree. In the answer Colorado admits the charge in respect of the Skyline ditch appropriation; denies that the diversions under the Laramie-Poudre tunnel appropriation have been in excess of the quantity accredited to it; and asserts that, with the possible exception of the year 1929, the total diversions under the recognized Colorado appropriations have been at all times within the aggregate of the quantities accredited to them

severally, and that, consistently with the decree, she lawfully may permit diversions under any of the recognized appropriations in excess of its accredited quantity so long as the total diversions under all do not exceed the aggregate of the quantities accredited to them severally. It is a necessary conclusion from the answer that all of the actual diversions have been made with Colorado's permission express or implied.

The evidence respecting diversions under the Skyline ditch appropriation and under the tunnel appropriation is conflicting; and this is true of the evidence respecting the total diversions under the recognized Colorado appropriations. After considering all of it, and such admissions as are made in the answer, we reach the conclusion that the diversions under the Skyline ditch appropriation have exceeded the quantity named in the decree, the excess ranging from 1,000 to 5,000 acre feet per year; that the diversions under the tunnel appropriation have closely approached, but have not exceeded, the quantity fixed in the decree; that the total diversions under the recognized Colorado appropriations, including those for the meadowlands, have uniformly exceeded the aggregate of the quantities which the decree accredits to them severally; and that, if the appropriations and the diversions for the meadowlands be put aside, the total diversions under the other appropriations have at times closely approached, but at no time have exceeded, the aggregate of the quantities accredited to them as distinct appropriations.

We already have dealt with the excessive diversions under the meadowland appropriations and have said that an injunction will be granted forbidding any further departure from the decree in that regard. That injunction will eliminate the excess in those diversions; and when that is done the total diversions under the several appropriations will be, as has just been pointed out, within the aggregate of the quantities which are accredited to them severally by the earlier decree—and this notwithstanding the diversions under the Skyline ditch appropriations are in excess of the quantity accredited to it.

We therefore must consider the contention made by Colorado that, consistently with the decree, she lawfully may permit diversions under any of the recognized appropriations in excess of its accredited quantity, so long as the total diversions under all do not exceed the aggregate of the quantities accredited to them severally.

In both Colorado and Wyoming water rights acquired by appropriation are transferable, in whole or in part, either permanently or temporarily; and the use of the water may be changed from the irrigation of one tract to the irrigation of another, if the change does not injure other appropriators.[1] The rules in this regard are but incidental to the doctrine of appropriation. That doctrine prevails in both States and the decree in the earlier suit was based on it. It was not the purpose of that suit or of the decree to withdraw water claims dealt with therein from the operation of local laws relating to their transfer or to restrict their utilization in ways not affecting the rights of one State and her claimants as against the other State and her claimants.

We perceive no reason for thinking that it is in any wise material to Wyoming and her water claimants whether the water in question is diverted and conveyed to the place of use through the Skyline ditch, the Wilson Supply ditch or the ditches of the Laramie-Poudre Tunnel Project. All are trans-mountain ditches and deliver the water in the Cache La Poudre Valley, which is in another watershed.

The diversions through the trans-mountain ditches in the quantities here shown are made with the consent of the owners of the water rights and with the full sanction of Colorado. Therefore as respects the present question the situation is not different from what it would be had the owners of the other claims formally transferred parts of their water rights to the Skyline owners. The appropriations remain as they were when the decree was entered and are still limited to the quantities which it accredits to them. But the Skyline owners are now permitted by the owners of the other claims and by Colorado to take and use part of the waters included in those claims. Wyoming and her claimants are in no way injured by this. No departure from the decree is involved. The thing which the decree recognizes and confirms is "the right of the State of Colorado, *or of any one recognized by her as duly entitled thereto*, . . . to divert and take" the water included in the designated appropriations.

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[1] Sieber *v.* Frink, 7 Colo. 148, 154; Strickler *v.* Colorado Springs, 16 Colo. 61, 68, *et seq.*; Frank *v.* Hicks, 4 Wyo. 502, 523; McPhail *v.* Forney, 4 Wyo. 556, 560; Johnston *v.* Little Horse Creek Irrigating Co., 13 Wyo. 208, 225, *et seq.*

We are accordingly of opinion that in the circumstances here shown the Skyline ditch diversions do not constitute an infraction of the decree.

In the brief for Wyoming we are asked to adjudicate the relative rights of the two States and of their respective citizens to divert and use the waters of Sand Creek, a small interstate stream, which is not a tributary of the Laramie. (259 U. S. 490.) The bill contains no showing in respect of these rights, there is no prayer in it for their adjudication, and they are not relevant to the controversy which it presents. We therefore must decline to consider them at this time.

In the bill it is complained that Colorado, although requested so to do, has refused to permit Wyoming to install measuring devices at the places of diversion for the purpose of ascertaining the amount of water being diverted in Colorado from the river and its tributaries, and there is a prayer for a decretal order permitting such installation. The evidence bearing on this matter hardly can be regarded as establishing the propriety of such an order, and yet it tends to show a need for improving the means and methods of measuring the diversions, for keeping accurate and complete records thereof, and for according to the representatives of Wyoming full access to both the measuring devices and the records. Recognizing this need, Colorado in her brief assures us that through her officers she will accord to Wyoming's officers free access to the measuring devices and to the registering charts, records, and other available data, will cooperate freely with them in devising an appropriate plan for measuring the diversions, and will give full consideration to such suggestions as they may make respecting the improvement of the measuring equipment. In this situation the order which is asked would be inappropriate. While the problem of measuring and recording the diversions is a difficult one, we entertain the hope that the two States will by cooperative efforts accomplish a satisfactory solution of it. But we think Wyoming should have leave to apply to us for an appropriate order in the matter if the two States are unable to agree and it is found that there is real need for invoking action by us.

For the reasons given in this opinion we conclude that the only relief to which Wyoming is now entitled is an injunction forbidding further diversions under the meadowland appropriations

of more than 4,250 acre feet per year measured at the headgates through which the water is diverted.

Such an injunction will be granted, Wyoming will be given leave to apply later on for an appropriate order respecting the measurement and recording of all diversions in the event the two States are unable to agree and there is need for action by this Court, jurisdiction of the cause will be retained for the purposes of such an application, and the costs will be taxed one-half to each of the two States.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.